

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**FIRST APPEAL No. 1999 of 1998****With****CIVIL APPLICATION No. 7245 of 1998****In****FIRST APPEAL No. 1999 of 1998****with****CIVIL APPLICATION No. 6622 of 2004****in****CIVIL APPLICATION No 3568 of 1998****For Approval and Signature:****HONOURABLE MR.JUSTICE R.S.GARG****HONOURABLE MR.JUSTICE K.M.MEHTA**

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
 - 5 Whether it is to be circulated to the civil judge ?
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GAMON INDIA LTD - Appellant(s)**Versus****SHETH ESTATE DEVELOPERS PVT LTD & 2 - Defendant(s)**

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Appearance :

MMR MJ THAKOR, SR.ADVOCATE WITH MR MJ PARIKH for with MR SP MAJMUDAR for Appellant

MR PR NANAVATI for Defendant(s) : 1,
MR MAHESH N BHATT for Defendant(s) : 2,
RULE SERVED for Defendant(s) : 3,

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**CORAM : HONOURABLE MR.JUSTICE R.S.GARG
and
HONOURABLE MR.JUSTICE K.M.MEHTA**

Date : 21/09/2005

COMMON ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.S.GARG)

1. Present is an appeal under Section 39 of the Indian Arbitration Act, 1940 against the order dated 31.3.98 passed by the learned 7th Joint Civil Judge (Senior Division), Vadodara in Special Civil Suit No. 151 of 1994, granting the application filed by the present respondents under Section 20 of the Arbitration Act and further directing that Mr. M.D. Deshmukh, Ex-Secretary of Maharashtra State Government be appointed as an Arbitrator and he shall proceed further in the matter, arbitrate into the dispute and submit his award within four months from the date of the order.

2. Plaintiffs/respondents filed an application

under Section 20 read with Section 8, so also under Section 33 of the Indian Arbitration Act, 1940 (hereinafter referred to as "the Act"), requiring the Court to grant the application, requisition the agreements allegedly in possession of the non-applicant/present appellant and appoint an Arbitrator in terms of the agreements. It was contended that the present appellant were awarded some works contract by Sardar Sarovar Nigam and the appellant awarded sub-contract to and entered into an agreement with the present respondents on 22.3.'92. It was also alleged that one Rameshbhai, on behalf of the present appellant contacted the original plaintiffs and entered into an agreement. It was further say of the present respondents/plaintiffs that the original agreement dated 22.3.'92 was subsequently modified and revised on 25.9.'92 and 17.11.'92. The submission in the application was that as the dispute had arisen, the matter in accordance with the terms of reference was

required to be referred to the arbitration, but the present appellant having failed in referring the matter to the arbitration, the court may ask them to produce a copy of the original agreement and thereafter, the Court may appoint an Arbitrator for making an award.

3. The present appellant filed their written statement as defendant. They agreed to certain facts stating that contract was awarded in their favour by Sardar Sarovar Nigam and they awarded a sub-contract in favour of the original plaintiffs on 22.3.'92. They however, candidly and categorically denied the fact of execution of the revised/supplementary agreements on 25.9.'92 and 17.11.'92. It was also pleaded by them that Shri Rameshbhai, for and on behalf of the present appellant never approached the present respondents and the typed copy of the alleged agreements dated 25.9.'92 and 17.11.'92 were forged and concocted documents and signatures

alleged to be of the Managing Director, namely, Mr. Abhijit Rajan were forged. It was submitted that in relation to the forgery in the documents, the defendant/present appellant has taken criminal action and has already filed a suit in Vadodara Court for recovery of Rs. 1,54,00,000/- and odd because of the breach committed by the present plaintiffs. It was submitted that the application was worth rejection, because, the foundation on which the application was filed was nonest and was on a forged agreement.

4. It is to be noted that along with the application filed under Section 20, the plaintiffs had filed number of the documents including typed copies of the agreements dated 25.9.'92 and 17.11.'92. They had also filed a letter alleged to be written by one Rameshbhai, wherein, said Rameshbhai had stated that the agreement was executed between the parties and said Rameshbhai was possessing the agreement. The

defendants, along with their written statement filed original agreement/memo of understanding dated 22.3.'92 and copy of the plaint in the Vadodara Suit. It is to be noted that the learned trial court, even on the disputed facts did not cast any issues, but proceeded to hear the parties and ultimately on the basis of the pleadings and documents observed that there is no reason for Rameshbhai to tell lies in his alleged letter and as the original defendant was not ready and willing to produce the original agreement, the Court must conclude that the original memo of understanding was revised and the agreements dated 25.9.'92 and 17.11.'92, which contained reference to the Arbitrator, were executed by the present appellant/defendant. It accordingly granted the application and appointed Mr. Deshmukh to arbitrate into the dispute. The appellant being aggrieved by the said order and judgment is before this Court.

5. Mr. Thakor, learned Senior Advocate for the appellant vehemently submitted that the court below was absolutely unjustified in proceeding with the matter without first casting issues and granting opportunity to the parties to lead their evidence and substantiate their pleadings. His further submission is that there is nothing on record to show or suggest that Rameshbhai was an employee or an agent of the appellant, the court has not seen that when existence of a particular fact is denied, then, burden to prove the existence of the fact would be on the party which is asserting it and in a case like present, no court could decide the matter on strength of the pleadings alone. His further submission is that under Section 20, an application can only be allowed if the court records a particular finding that an agreement was executed and the said agreement contains the matter relating to the reference to the Arbitrator. His submission is that the court below, without recording the

evidence or even without appreciating the documents filed along with the written statement went wrong in granting the application.

6. Learned counsel for the respondents on the other hand, submitted that as existence and execution of supplementary/revised agreements dated 25.9.'92 and 17.11.'92 were not specifically denied and as no evidence was led by the present appellant, the court below was justified in granting the application. It is also contended that from the letter of Rameshbhai, it would clearly appear that some agreement was entered into between the parties and Rameshbhai was acting as agent of the present appellant. Further submission is that in matter like present, if no request is made by the present appellant to lead evidence in support of their defence, the court below was justified in granting the application and appointing an Arbitrator.

7. We have heard the parties at length and have perused the records.

8. Arbitration Act of 1940 is an Act to consolidate and amend the law relating to arbitration. Section 2[a] defines "arbitration agreement" to mean a written agreement to submit present or future differences to arbitration, whether an Arbitrator is named therein or not. Section 20 refers to a situation where agreement relates to referring the dispute to the arbitration, but the same could not be referred, because arbitration agreement is in possession of the opponent. Under Section 20, a person desirous of referring a matter to the arbitration can make an application to the court, request the court that the opponents be asked to file the agreement in the court, the court may look into the agreement, refer the matter to the arbitration. Section 20 reads as under:-

"Sec.20. Application to file in Court arbitration agreement.____ Where any person have entered into an arbitration agreement before the institution of any suit with respect to the subject-matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under chapter II, may apply to a court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.

[2] The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the remainder as defendant or defendants if the application has been presented by

all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

[3] On such application being made, the Court shall direct notice thereof to be given to all parties to the agreement other than the applicants requiring them to show cause within the time specified in the notice why the agreement should not be filed.

[4] Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, when the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court.

[5] Thereafter the arbitration shall proceed in accordance with, and shall be governed by, the other provision of this

Act so far as they can be made applicable."

9. A fair reading and understanding of Section 20 of the Arbitration Act would show that any party who pleads existence of an agreement when files an application to the court for filing of the agreement or appointment of an Arbitrator, then, it has to satisfy the judicial conscience of the Court that there is a written agreement to refer a dispute for decision of an Arbitrator. In a case like that, an application has to be in writing, when such application is made to the Court, notice shall be given to all the parties to the agreement, other than the applicants, requiring them to show cause within the time specified in the notice that why agreement should not be filed. After giving proper opportunity of hearing to the parties, if the court is of the opinion that no sufficient cause is shown, then it shall order agreement to be

filed and shall make an order of reference to the Arbitrator appointed by the parties whether named in the agreement or otherwise, or, where parties cannot agree upon an Arbitrator, the Arbitrator may be appointed by the court. Thereafter, the Arbitrator shall proceed in accordance with law and shall be governed by other provisions of the Arbitration Act, 1940.

10. In the present matter, the plaintiffs/original applicants asserted existence of the agreement and due execution, the alleged fact was vehemently denied by the other side. The present appellants had contended that they entered into memo of understanding on 22.3.'92 and nothing beyond that. They were too specific in their defence in saying that the alleged revised/supplementary agreements dated 25.9.'92 and 17.11.'92 were forged and concocted. They had also stated before the court that in relation to the forgery, they have taken criminal action and

have already filed a suit in Vadodara Court in the year 1993 seeking damages from the present respondents/original applicants to the tune of Rs. 1,54,00,000/- and odd. In the said suit filed by the defendant/present appellant, they had also sought for a declaration that the alleged agreements dated 25.9.'92 and 17.11.'92 were forged, manufactured and bogus. If that was the defence of the present appellant, then no court, without recording the evidence of the parties could proceed to decide the matter. In a case like present, provisions of Sections 101 to 104 of the Indian Evidence Act, 1872 would come into play. When a fact is asserted by one party and is denied by the other, then, the party asserting the fact is required and obliged to prove the fact by producing either documentary or leading oral evidence. According to Section 102 of the Indian Evidence Act, 1872, burden to prove a particular fact would be on a party which shall fail in case none of the party leads evidence.

In a dispute where plaintiff asserts a fact and the defendant denies, then, the plaintiff is required to prove the fact. Section 3 of the Evidence Act defines "evidence" that "evidence" means and shall include all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence, all documents including electronic records produced for the inspection of the Court; such documents are called documentary evidence. The definition further says that a fact is said to be **proved** when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. A fact is said to be **disproved** when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a

prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist. In a case where the court relies upon oral/documentary evidence filed by either of the party and holds that a particular fact so exists, then, such fact shall be held to be proved. In a case where both the parties have led evidence and after considering pros and cons in their true perspective, the Court holds that a particular fact asserted by a party does not exist, then, it would be held to be disproved. A fact is said not proved when it is neither proved nor disproved. Present would be a case falling under the clause "not proved". When the plaintiff has asserted a fact, but did not lead any oral or documentary evidence in support of his case, though burden to prove existence of the fact or of the document under Section 102 of the Indian Evidence Act was upon the plaintiff, then, the fact is not proved.

11. It is further to be seen that the learned court below in its order has observed that the original applicant produced the letter dated 26.9.'92 from Shri Rameshbhai addressed to the original applicant stating that " your original copy of agreement between you and the others is with me with your consent." The court below, instead of appreciating the statement contained in the alleged letter, which according to us was not proved without leading any oral evidence, did not appreciate the words " with your consent". When the letter was sent to the original applicants/respondents and it said that the agreement was in possession of Shri Rameshbhai "with your consent", then, that would mean that Rameshbhai was holding the agreements under the directions of the original applicants. The court had simply observed that this Shri Rameshbhai has no reason to tell lies. The question for consideration would be that who proves the writing of the letter, existence of Rameshbhai

and correctness of the statement made in the letter dated 26.9.'92. If the terms of the letter are to be read as those are, then, it would clearly appear that Rameshbhai was holding the agreement for and on behalf and with the consent of the original applicants. If that was so, then, the original applicants could always ask Rameshbhai to hand over the original agreement to them or they could request the court to examine Rameshbhai to produce all original agreements in the court and prove the contents of his letter dated 26.9.'92. In our considered opinion, the court below was absolutely unjustified in relying upon the said letter and holding that as Rameshbhai had no reason to tell lies, existence of the agreements dated 25.9.'92 and 17.11.'92 stands proved.

12. It is again to be seen that nobody had stated before the Court nor proved by leading oral or documentary evidence that the copies of the

agreements dated 25.9.'92 and 17.11.'92 were the copies of the original agreement. Unless the original agreements were brought before the Court or evidence was led to prove that the copies contained signatures of Mr. Abhijit Rajan, it was not proper for the lower court to hold that such agreements were executed and Mr. Abhijit Rajan, as Managing Director of M/s. Gamon India Limited has affixed his signature on the said two agreements. An agreement can be proved under the admission of the parties or by examining a person who has affixed the signatures on the agreement and in whose presence, others have affixed their signatures or by examining a witness in whose presence parties to the agreement have affixed their signatures or by the scribe of the document in whose presence the parties had affixed their signatures. In the present matter, except the fact contained in the letter alleged to be written by Rameshbhai on 26.9.'92, nothing else has been brought on the record.

13. In our considered opinion, the court below went wrong in not appreciating that the present appellant had already instituted a suit in Vadodara court for recovery of Rs. 1 Crore 54 lacs and odd and have also sought for a declaration that the alleged agreements dated 25.9.'92 and 17.11.'92 were forged and not binding. The lower court also went wrong in observing that no action before the competent criminal court was taken by the present appellant while the fact is otherwise. The court also went wrong in holding that the letter said to be written by Rameshbhai proves existence of the agreement and agreement to refer the matter to arbitration.

14. As the court below has acted perversely and without appreciating the legal provisions, we must set aside the order passed by the learned court below. It is accordingly set aside.

15. As the trial court did not cast issues in the matter and proceeded to decide the matter on the documents and the pleadings, we must remand the case back to the trial court with a direction to the trial court to proceed in accordance with law and the observations made aforesaid. The trial court shall proceed in accordance with law.

16. The question still would be that after repeal of 1940 Act, whether the court can proceed to hear the matter under the provisions of the old Act. Section 85 of the Arbitration and Conciliation Act, 1996 provides that notwithstanding the repeal of 1940 Act, provisions of the said enactment shall apply in relation to arbitration proceedings which commenced before 1996 Act came into force unless other wise agreed by the parties and this 1996 Act shall apply in relation to arbitral proceedings which commenced on or after this Act

comes into force. Section 21 of 1996 Act provides that unless otherwise agreed by the parties, arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent. In the present matter, request was received by the present appellant in the year 1992/93 and the application under Section 20 came to be filed in the year 1994 before 1996 Act came into force therefore under the circumstances, the application filed under Section 20 of the Arbitration Act, 1940 is required to be disposed of in accordance with the procedure as provided under the 1940 Act.

17. During pendency of this appeal, the appellant had filed Civil Application No. 7245 of 1998 along with the said application, the appellant had filed copy of the original of the affidavit sworn by Mr. Abhijit Rajan on 6th August, 1998. It is stated in the said affidavit

that the original agreements on which the defendants were placing were bogus and forged. It is also asserted in the said application that criminal action had already been taken against the present respondents and before filing an application before the Vadodara court, the original plaintiff/applicants had filed an application before Ahmedabad Court, wherein Mr. Abhijit Rajan had filed his affidavit, asserting that he never appended his signatures to the alleged agreements and the agreements were forged. Prayer in the application is that the present appellant be allowed to lead or produce additional evidence under Order XLI Rule 27 of the Code of Civil Procedure. As we are remanding the matter to the trial court, it would not be necessary for us to decide the said application, because, each of the party now would be free to produce and lead the documentary and oral evidence. The Civil Application No. 7245 of 1998 does not survive and stands disposed of. The

appeal is allowed with costs of Rs.10,000/- (Rupees Ten Thousand only). The parties present in the Court shall appear before the trial court on 17th October, 2005. Consequently, Civil Application No. 6622 of 2004 stands disposed of.

[R.S. GARG, J.]

[K.M. MEHTA, J.]

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PER: HON'BLE MR.JUSTICE K.M. MEHTA, J.

1.1I have gone through the judgement passed by my learned brother Mr. Justice R.S. Garg. I fully concur with the view given by my learned brother Mr. Justice R.S. Garg. However, looking to the importance of the matter, I would like to add my reasoning in this behalf. As the facts are set out by my learned brother Mr. Justice R.S. Garg, I do not intend to deal with the facts in detail.

1.2From the facts set out in the judgement of the learned trial Judge as well as which are given on record it is clear that only copies of agreement dated 25.9.1992 and 17.11.1992 were produced but original agreements were not brought on record. A letter also alleged to have been written by Ramesh on 26.9.1992, however, was produced. In fact the said

agreement was disputed by filing affidavit of Shri Abhijit Rajan, Managing Director of the appellant. In view of this fact, it was incumbent upon the learned Judge to enquire as to is there any original agreement in which arbitration clause executed presented before the Court when the learned Judge is concerned with the arbitration matter. It appears that his attention has not been drawn to the Arbitration Act, 1940 (old Act).

1.3 In view of this, the following discussion is also necessary. It may be noted that the learned Judge was also considering the application filed by respondent under Section 8 read with Section 20 of the Arbitration Act. It appears that provisions of Section 8 of the Act has also not been invited to learned Judge and he has not referred to it at all. As regards Section 20 of the Act, my learned brother has dealt with at length and therefore I am not dealing with the same. In view of the same, I

would like to mention the following aspects of Arbitration Act.

2. Section 2(a) of the Act provides definition of arbitration agreement which means "a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not".

2.1 In view of this definition the essentials of an arbitration agreement are:

- (i) there should be a valid and binding agreement, the parties must be ad idem (of the same mind);
- (ii) there should be an intention to refer the disputes to arbitration and to be bound by the decision of the arbitrator;
- (iii) the agreement must be in respect of present or future disputes; and
- (iv) the agreement must be in writing but signatures of the parties are not

essential."

2.2 In view of the aforesaid definition and essentials of an arbitration, the intention of the parties has to be seen in every case. If the language of the clause leaves no room for doubt that the parties intended to enter into an arbitration agreement and to have their disputes resolved by arbitration, it must be held that the agreement is an arbitration agreement, whether the words "arbitrator" or "arbitration" have been used in the clause or not.

2.3 Endeavour should always be to find out the intention of the parties and that intention has to be found out by reading the terms broadly, clearly without being circumscribed.

2.4 Section 8 of the Arbitration Act, 1940 reads as under:

"8. Power of Court to appoint arbitrator or umpire - (1) In any of the following cases:

(a) where an arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties, and all the parties do not, after differences have arisen, concur in the appointment or appointments.

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(2) If the appointment is not made within fifteen clear days after the service of the said notice, the Court may, of the application of the party who gave the notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators or umpire, as the case may be, who shall have like power to act in the reference and to make an award as if he or they had been appointed by consent of all parties."

2.5 The next point which has to be considered is that here as to whether Court appointed an

arbitrator? The Court has acted pursuant to Section 8 read with Section 20 of the Arbitration Act. Section 8 provides power of Court to appoint Arbitrator or Umpire. Reading the said Section 8 sub-clause (a) (b) and [c] it provides that this section lays down the procedure for the appointment of an arbitrator or arbitrators or an umpire in certain cases. Clause (a) of sub-Section (1) contemplates the case of an arbitrator or arbitrators, clause [c] of an umpire and clause (b) of an arbitrator as well as umpire. Unfortunately, the parties have not invited the attention of the learned Judge to Section 8. This Section confers power upon the Court to appoint an arbitrator where the parties do not concur in his appointment while Section 20 entitles a party to apply for the filing of the arbitration agreement in Court and empowers the Court to make an order of reference to the arbitrator appointed by the parties, or in the absence of such appointment, to the arbitrator

appointed by it. In the former case, the parties themselves make the reference out of Court, after the arbitrator is appointed by the Court. In the latter case, it is the Court which refers the dispute.

2.6 I am not dealing with Section 20 in detail as my learned brother has already dealt with the said Section. Section 20 confers power on the Court to order the agreement to be filed and further to make an order of reference to the arbitrator appointed by the parties or where the parties cannot agree upon an appointment, to an arbitrator appointed by the Court.

Unfortunately from the facts stated above, the learned Judge has not considered provisions of Section 2(b) & Section 8 of the Arbitration Act and passed the order.

In view of the same the order of the learned

Judge is contrary to the provisions of Section (b) and Section 8 of the Arbitration Act.

[K.M. MEHTA, J.]

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